which is a HUD rent subsidized apartment complex, were continuing to use their old address in order to receive the rent subsidy. The informant stated that part of the rent subsidy was being kicked back to the apartment management.

Result: Although unable to substantiate the specific allegation, while HUD-IG was conducting this inquiry, they found the books at the apartment project to be in poor order. Because of this, a HUD Inspector General's internal audit was conducted. This report found widespread misappropriation of funds and mismanagement at the complex. The audit report disallowed about $20,000 in expenditures and question over $450,000 in costs.

DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE EXAMPLE

Allegation: The caller alleged that a fellow construction worker in Oklahoma and a member of the local union was receiving welfare even though he was employed. The caller alleged that the individual was able to do this because he used his brother's social security number for employment purposes and collects welfare under his own social security number.

Result: Upon investigation, these allegations were substantiated and charges will be filed in the near future.

VETERANS ADMINISTRATION EXAMPLE

Allegation: A VA physician assigned to a VA medical center in Pennsylvania, was operating an afternoon private practice when he should have been on duty at the center.

Result: The physician has been reprimanded by his director, charged for annual leave for all the unauthorized time off, and is now required to report his time in and out of the center.

VETERANS ADMINISTRATION EXAMPLE

Allegation: A disabled veteran collecting 100 percent disability and considered by the VA to be unemployable due to his handicap, was actually employed in Texas as a private park manager. He showed his wife on the payroll as being the park manager, (when in fact she was not working) to "cover up" to the Government that he was employed.

Result: The VA has suspended all benefits to the veteran after their investigation based upon the GAO Hotline referral.

BUREAU OF PRISONS EXAMPLE

Allegation: The caller alleged various fraudulent activities at a State Penintentiary by the Superintendent and his associates. These included misappropriation of funds from education vouchers, buying of parolee and personal use of Government property. These people were also alleged to have ties with organized crime.

Result: This allegation was referred by the U.S. Department of Justice to the State Division of Criminal Justice which was then investigating similar State violations. The investigation did not uncover sufficient evidence to warrant prosecution but the results were referred to the State Ethical Standards Commisison. As a result, the Superintendent and other officials have been removed or forced to resign.

GENERAL SERVICES ADMINISTRATION EXAMPLE

Allegation: The caller alleged that half of the 19th floor (a space 60'x300' or 18,000 sq. ft.) in a New York City commercial building which the General Services Administration (GSA) rented for a Federal Agency, has remained vacant and unused for the past year and a half. The caller believed that this was an example of Government mismanagement and waste.

Result: The General Services Administration, Inspector General's Office, inspected the commercial building and found there was unused or underutilized space in excess of 20,000 square feet. The inspection found that this situation has existed 15 months. Based on the rental rate the Inspector General believes approximately $300,000 was spent on the space in question. This matter is currently under review by the GSA administration.

DEPARTMENT OF JUSTICE EXAMPLE

Allegation: The caller alleged that the manager of a garment factory in Los Angeles, California, is employing illegal aliens. The caller also alleged one of the aliens used his American born son's name and social security card.

Result: Because of the hotline allegation, the Immigration and Naturalization Service was able to obtain a search warrant and subsequently apprehended six illegal aliens. In addition, the man who used his son's social security card was arrested and admitted using the card.

DEPARTMENT OF TREASURY EXAMPLE

Allegation: The caller alleged that a secretary in the Office of the Secretary of Treasury was falsifying her time cards as to hours worked, sick leave and annual leave.

Result: The allegation was substantiated after investigation by the Treasury Inspector General's Office and the case referred to the local United States Attorney for prosecution. The individual was prosecuted and the total amount of the restitution is being discussed. The individual is no longer employed by the Federal Government.

COMMUNITY SERVICES ADMINISTRATION EXAMPLE

Allegation: The caller alleged that a CSA funded project was using Federal funds received for program operations to purchase land and equipment worth over $600,000, then liquidating the items for their personal use.

Results: Investigation by CSA substantiated the allegations and the project has been defunded. The FBI and IRS have assumed control of the case under the direction of the local United States Attorneys Office.

DEPARTMENT OF THE NAVY EXAMPLE

Allegation: The caller alleged that a Navy Data Automation Center was wasting Government funds by not processing Maintenance Credits for processing time which is lost due to mechanical breakdown or other causes which preclude use of leader computers. Acording to the caller, Maintenance Credits have not been submitted in 5 years although the computers have been down for longer periods than the contract allow.

Result: Naval auditors substantiated these allegations and have recommended that the Data Center identify all hardware and software downtime credit due and submit that total to contractors for recoupment. To date, a total of $12,969 has been recouped at this installation. The center has implemented auditor's recommendation to ensure accurate records to support downtime credits. Audit being expanded to other Navy Data Processing Installations.

DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE EXAMPLE

Allegation: The caller alleged that a recipient of welfare assistance for the past 6 years has been working full time but not reporting this income.

Result: The investigation substantiated the allegations. The recipient was receiving welfare payments of $431 per month while earning an additional $800 per month. The case has been referred to the local prosecutor's office for action.

GENERAL SERVICES ADMINISTRATION EXAMPLE

Allegation: The caller alleged that work currently underway to modify a GSA controlled facility to make it accessible to handicapped persons, was probably unnecessary because the building in question was a warehouse not open to the public, and none of the employees were handicapped. It was estimated the modifications to the building to install a special elevator and toilet facility was $70,000.

Result: Upon investigation, since the building was a warehouse not open to the public, the Regional Administrator stopped the project.

DEPARTMENT OF THE ARMY EXAMPLE

Allegation: The caller alleged that a civilian foreman in the Maintenance Department at a Corps of Engineers installation was stealing supplies and equipment to operate a private business which he ran from his Government office.

Result: Preliminary investigation by the Army found probable cause to believe that the individual was involved in the theft of Government equipment and the investigation has been assumed by the FBI.

CONCLUSION

Mr. SASSER. Mr. President, the examples I have cited are but a few of the many hotline calls that have been followed up so far. Many more are being investigated and some cases have already been referred to the Justice Department for possible prosecution.

Mr. President, I join with the distinguished and able chairman of the Senate Committee on Appropriations (Mr. MAGNUSON) and ranking minority member, our distinguished friend (Mr. YOUNG) in urging the various agency Inspectors General to actively follow these cases to their conclusion.

The Comptroller General, Mr. Elmer Staats, the head of the fraud task force, George Egan, and the staff of the hotline unit under Bob Meyer are to be commended for their very fine efforts to reinstill a sense of integrity in Federal Government operations.

CONCLUSION OF MORNING BUSINESS

The ACTING PRESIDENT pro tempore. The time for morning business has expired.

RECOGNITION OF SENATOR CHAFEE

The ACTING PRESIDENT pro tempore. The Senator from Rhode Island is recognized for not to exceed 15 minutes.

THE INTELLIGENCE IDENTITIES PROTECTION ACT OF 1980

Mr. CHAFEE. Mr. President, from the time George Washington dispatched Benjamin Franklin to France in 1776, the Government of the United States has sent American citizens abroad on difficult and dangerous missions in pursuit of the goals of our Nation. Franklin's secret mission to France was instrumental in securing European support for the fledgling American Revolution, and he risked being hanged for treason by the British if captured.

It was fortunate for our Nation that Franklin was not apprehended on his way to France by the two British warships sent to intercept him at the mouth of the Delaware River. It was also fortunate for our Nation that the treachery of another American, Dr. Edward Bancroft, who served both as Franklin's principal secretary and as a double agent for the British, was unable to destroy his vital mission for America. For Frank-

lin would eventually secure the treaties of amity and commerce, and of alliance, with France which provided sustenance and support to our new-born Nation.

Mr. President, the growth of this great Republic over the course of 2 centuries has not diminished our need for clandestine operatives and operations abroad. Now, more than ever, we need to know what is going on in the world so that our leaders can make informed decisions. That is why, in 1947, the assignment of clandestine agents abroad was institutionalized by President Truman with the formation of the Central Intelligence Agency, and a permanent cadre of covert agents was created. Intelligence collection and the assignment of American agents—our fellow citizens—to posts abroad have had the support of every administration and every Congress, including this one that is in session, since 1947.

In the last 5 years, however, certain Americans have made a profession of ferreting out the identities and publishing the names of our agents, with the result that their lives and the lives of their families and friends are placed in jeopardy. Richard S. Welch, the CIA station chief in Athens, a resident of Providence, R.I. was murdered as a result of this "naming names." The lives of others have been threatened, the most recent being on July 4 of this year, when, in Jamaica, one of those named as an agent was Mr. Richard Kinsman. His home was shot up, a bomb was placed outside his house, and it was only, fortunately, because of the absence of his family that no one was killed or wounded. Yet there is no law on the books today under which this activity of "naming names" can be prevented.

Mr. President, this is an intolerable situation. The Congress has a responsibility to place criminal penalties on those who are in the business if exposing our agents without, at the same time, threatening the critic of intelligence policy or the journalist who might reveal the name of an agent in the course of a news report.

We in no way want to threaten a critic of our foreign policy or our intelligence policy. We in no way want to inhibit journalists who might reveal the name of an agent in the course of a news report. Those are not the people we are trying to get at. In the judgment of the administration and the intelligence committees of this Congress, the Intelligence Identities Protection Act of 1980 meets this dual standard of protecting freedom of the press and freedom of speech and, at the same time, protecting the lives of our agents.

Mr. President, the opponents of this bill claim that its passage would threaten any journalist or editor who decides to publish "lawfully obtained information about intelligence agencies." This is blatantly false and misleading. The Intelligence Identities Protection Act would criminalize, under very limited circumstances, only the authorized disclosure of information identifying certain individuals engaged or assisting in the foreign intelligence activities of the United States. The legislation does not assault the first amendment. It does not threaten public discussion. It will not stifle debate about our country's foreign policy or intelligence activities, and it would not prevent the exposure of allegedly illegal activities or abuses of authority.

Disclosures of intelligence identities by persons who have not had authorized access to classified information would be punishable only under specified conditions, which have been carefully crafted and narrowly drawn so as to make the act only applicable to those engaged in an effort or pattern of activities designed to identify and expose intelligence personnel.

Not only has the crime been narrowly drawn in the Senate bill, but a series of elaborate defenses against prosecution have been erected to protect the journalist and intelligence critic. For example, in a prosecution, the Government would have to prove each of the following elements beyond a reasonable doubt:

First, that there was an intentional disclosure of information which did in fact identify a "covert agent;"

Second, that the disclosure was made to an individual not authorized to receive classified information;

Third, that the person who made the disclosure knew that the information disclosed did in fact identify a covert agent;

Fourth, that the person who made the disclosure knew that the United States was taking affirmative measures to conceal the covert agent's classified intelligence affiliation;

Fifth, that the disclosure was made in the course of a pattern of activities that was intended to identify and expose covert agents; and

Sixth, that the person making the disclosure had reason to believe that his activities would impair or impede the foreign intelligence activities of the United States.

Mr. President, what further defenses against prosecution could be asked for by those who claim they have first amendment concerns? What more can be done to protect the legitimate journalist and critic of intelligence policy than to provide this long and detailed sequence of specific defenses?

A careful examination of the issues and a weighing of the clear and present danger to our Nation's intelligence capabilities resulting from unauthorized disclosures of intelligence identities against the carefully and narrowly drawn prohibition in the Intelligence Identities Protection Act has resulted in overwhelming approval of this legislation by the Senate Intelligence Committee. Members of this committee have closely examined the contending arguments and have concluded that this legislation can help prevent damage to our crucial intelligence sources and methods of collection without impairing civil or constitutional rights.

Furthermore, this bill has the strong support of the Justice Department and of the administration.

I believe that the vast majority of the American people know that an effective intelligence service is essential to national survival in an increasingly unstable world. Passage of the Intelligence Identities Protection Act will be an important protection for our intelligence officers in the field who daily sacrifice the comforts of home to serve their country under difficult and dangerous circumstances, and to those around the world who risk liberty and life itself to cooperate with our country in keeping our leaders, and those of the free world, well informed.

Mr. President, I urge my colleagues to act on this vital piece of legislation before more names are named, before more lives are threatened and before more missions are destroyed. I find it ironic that those who oppose this legislation for constitutional reasons, feeling it impinges upon the rights of free speech or a free press, will not let us, the elected representatives of the people, at least debate the legislation on the floor and take a vote. Let us have a discussion on the free marketplace. Let us have the competition of ideas and arrive at a decision.

I know the exigencies which the majority leader and the minority leader are working under. I know the press of business to complete activity so we can adjourn, or at least recess, for the election.

But, Mr. President, it would be my hope, if we cannot get to this bill before we recess on October 3, or whenever it is, that we can take it up when we return.

I see the distinguished majority leader is here. I wonder if he has any help he might give me on this, any illumination, because I think it is important. I know he has given consideration to it. I know that as a member of the Intelligence Committee, he has given a lot of thought to these problems.

All I wish to say, Mr. President, is that if there are holds on the bill, I hope they will not prevail forever and, if we cannot do it now, we should take it up when we return. If it takes some time, so be it. I think it is an important measure. Let us debate it out.

If there are problems with the first amendment, all right. Let us hear them set forth, and then finally go to a vote on it.

That would be my hope, Mr. President.

I wonder if the majority leader could help me on this at all while he is here. I wonder if he can give us any predictions on what might possibly happen.

Mr. ROBERT C. BYRD. I can only say to the distinguished Senator, I very much favor legislation in this field.

There are problems, as I understand it, between the Intelligence Committee and the Judiciary Committee, and they have been trying to work those problems out. At the moment, they have not resolved them. But I would hope such problems could be resolved and that the Senate could, in due time, take up the legislation.

Mr. CHAFEE. I thank the majority leader.

I certainly hope we can. This is important. It is true, as he so rightly points out, that the Judiciary Committee has had problems. They have considered the legislation now on the floor.

What will transpire is that the bill, as it emerged from the Intelligence Committee, will be the bill we consider, and

then the Judiciary Committee will have amendments.

That is all right. All I hope is we can get to it and vote on the amendments, debate them and vote them.

I hope these amendments will not pass and that the bill, as it emerged from the Intelligence Committee, will be the bill that passes here on the floor. But we must get to it.

Mr. BAKER. Will the Senator yield briefly?

Mr. CHAFEE. Yes.

Mr. BAKER. I, too, hope a bill passes addressing this subject. While it does not appear likely it will be done today or tomorrow, when I hope we will be able to adjourn in accordance with the resolution passed by the Senate, I assure the Senator from Rhode Island that I agree with the need for this legislation and I will do my best, at the earliest moment, to see it comes to a vote so that the Senate can work its will.

Mr. CHAFEE. I thank the distinguished minority leader for that assistance.

I know both leaders are concerned about this issue. I had an opportunity to discuss it in some detail with them. It is my hope if, as appears unlikely, we cannot handle it before we leave, then when we return it will be possible.

Let us discuss the merits or demerits of the bill here on the floor—in a free trade of ideas. Let there be the competition of the market. Let us arrive at what is best. Above all, let this bill—S. 2216—come to the floor so we might vote on it.

Mr. President, I yield to the Senator from Wyoming.

Mr. SIMPSON. Mr. President, I think that few argue with our colleague from Rhode Island or can match his depth of intensity with regard to this issue. We understand what he is telling us, and it is a critical issue that we must address.

Mr. President, I wish to add to what my colleagues have already stated concerning S. 2216, the Intelligence Identities Protection Act of 1980, by briefly outlining for the Senate the effect of the four amendments adopted by a narrow majority of the Judiciary Committee. In essence these amendments effectively gut the bill by creating loopholes which permit a continuation of the flagrant and intentional exposure of covert intelligence employees and agents by individuals whose purpose in so doing may well be to destroy our Nation's capability of collecting foreign intelligence from clandestine sources.

I realize that perhaps there are certain of my colleagues who really believe in their hearts that it is inappropriate for this Nation to engage in undercover intelligence activities. I admire them for their idealism, and I only wish that the United States could exist in a world of reason, devoid of hostility and dedicated to the fair resolution of differences.

Unfortunately, we do not live in such a world; indeed, the world we find about us abounds with those who would, if it were in their power, see that our Nation and our very way of life is destroyed. These hostile elements in the world are more than willing to avail themselves of any means in seeking their ends, and we would be hard pressed to withstand their efforts were it not for our ability to collect clandestine intelligence information.

I ask those who may oppose in principle the existence of a clandestine intelligence collection service to accept that a significant majority of the people of this country and of their colleagues are committed to the preservation of a clandestine intelligence service and to its protection from those who wish to render it ineffective.

Unfortunately, those outside this Chamber who would destroy our ability to conduct clandestine intelligence collection activities are swift to justify that these actions are protected by the first amendment. But the first amendment only protects those who exercise their legitimate rights of commentary and criticism and not those whose pattern of activities inevitably leads to the publication of list after list of agent identities—the naming of names. The line had been well drawn in the bill as reported by the Intelligence Committee, and I might add, with sufficient clarity to give fair and full warning of what actions are beyond the protection of the first amendment.

To those of my colleagues who exhibit concern that this bill transcends the limits of the first amendment, I ask how can that be? The first amendment exists—it is there—and no legislation that Congress passes can effect the valuable protections that it affords. Let us then prohibit the flagrant and intentional identifying of agents that so greatly damages this Nation's ability to collect foreign intelligence and that so clearly endangers the lives and safety of the agents themselves and their families. Such actions are clearly outside the scope of the first amendment and should be prosecuted.

In an attempt to crater this bill and to render its operative provisions ineffective, a narrow majority on the Judiciary Committee has adopted four amendments. The total effect of these four amendments is to create enough loopholes and impediments to prosecution in order to insure that the activities originally prohibited may continue unabated with only minor changes in form.

Section 501(c) of the bill was carefully crafted to protect legitimate publishing activities and to prosecute the obvious and flagrant exposures of intelligence identities—the "naming of names"—that is intended solely to cripple the ability of our intelligence agencies to undertake the essential clandestine collection of intelligence information. As amended by the Judiciary Committee, section 501 (c) now precludes any possibility of prosecution for flagrant exposures as long as the individual or organization publishing such information can effectively claim that a prior publication—no matter how obscure the source or where published—took place.

Consequently, those irresponsible publishers who would violate the spirit of this legislation have only to enlist the cooperation of a foreign periodical in order to continue their exposures of the identities of this Nation's covert intelligence employees and agents. Although such cooperative efforts may arguably be an illegal conspiratorial activity, it would be an extremely difficult task to discover and prove the existence of such a conspiracy.

The committee has also adopted by amendment a new subsection (e) to section 502 that makes it a defense to prosecution if even the flagrant exposures are:

> An integral part of another activity such as news reporting of intelligence failures or abuses, academic study of government policies and programs, enforcement by a private organization of its internal rules and regulations, or other activities protected by the first amendemnt to the Constitution.

Arguments were made that the amendment was intended only to guarantee first amendment rights for the specific activities noted—news reporting, academic studies and private organization activities—and any other activity construed to be protected by the first amendment. As my colleague on the Judiciary Committee, former judge and now Senator HOWELL HEFLIN, now presiding, stated, "How do you legislate what is included in considerations of the first amendment?" That is a good question, and it should give one serious reservations. Joined by my colleagues, I offered a modification to the amendment which would simply have eliminated the specific enumerations and given a broad protection under the first amendment as follows; "(e) It shall not be an offense under subsection (c) of section 501 if the disclosure of the information described in such subsection is protected by the first amendment to the Constitution".

Why make any specific exceptions? Activities are either covered by the first amendment to the Constitution or they are not. That is for the courts to decide—not for the Congress. This committee amendment is a total distortion of any previous concept of first amendment considerations.

These amendments are apparently the creation of the fertile minds of overzealous staff members of the American Civil Liberties Union. They lost unnecessary sleep in their efforts. The amendments serve no purpose other than to undermine this legislation under the guise of an expressed concern for first amendment rights. Such rights are already guaranteed, and absolutely no legislative efforts we undertake in that regard will have—or ever should have—any effect on those clear rights.

The committee also adopted an amendment that would exclude the Peace Corps and the Agency for International Development from those agencies of Federal Government that are available to provide "official cover" to undercover employees of our intelligence agencies. Traditionally, the Peace Corps has never provided—and should not provide—such cover and it is effectively precluded from doing so by statute. The Agency for International Development has not provided cover in the past few years but is not precluded by statute from doing so.

I object to the specific statutory exemption of any Federal agency from being able to provide cover for intelligence agency employees for two reasons: First, it makes it easier for unauthorized personnel to determine which overseas United States employees are intelligence employees, thus making their cover almost transparent; and second, it unnecessarily reduces the flexibility which must be available to the President in the conduct of foreign intelligence information gathering.

In certain circumstances the use of cover within a specific agency may well be essential to the collection of some type of foreign intelligence information, and the President should always have the power to authorize the use of such cover when necessary. I do not wish to revoke the Peace Corps statutory exemption, since the number of Peace Corps volunteers and employees are so few and their access to foreign sources of worthwhile intelligence information is so very limited. But I do not wish to establish any further exemptions that will only make the problems associated with adequate intelligence cover that much more difficult to overcome.

Additionally, the "Judicial Review" amendment adopted by the committee is far too broadly written and it can only result in an endless flurry of court cases. All manner of individuals or institutions, regardless of standing, will be able to initiate "such actions as may be appropriate" in construing the constitutionality of any provision in this bill.

I believe that such an expedited review procedure can and should be accomplished within the context of each actual case in controversy and it is not a necessary nor advisable provision to have in this legislation.

In summary, Mr. President, the amendments adopted by the narrow majority on the Judiciary Committee serve only to cloud and distort the purpose of this very necessary legislation. I ask my colleagues to immediately request the Senate's consideration of this bill and reject the amendments proposed by the Judiciary Committee.

Mr. CHAFEE. I thank the distinguished Senator from Wyoming.

Mr. President, I wish to make it clear that I am confident that those in the Judiciary Committee who voted for the amendments had a concern about our intelligence services abroad; but I believe that the reason they voted against our bill or for their amendments was their concern that it impinged upon the first amendment. In other words, I would not want the impression to go out that those who voted for the amendments were opposed to clandestine activities of the United States abroad, and I do not believe that the Senator meant to imply that.

There are in our Nation those who believe that there should not be any covert activities by the United States abroad. However, I do not believe that our fellow Senators are of that view. In their decision, I believe that their concern was primarily about the first amendment.

The distinguished Senator from Wyoming was there, and I believe he will bear me out in that appraisal of the votes against the bill or, as it were, votes for the amendments in the Judiciary Committee.

Mr. SIMPSON. Mr. President, I concur in my colleagues observation, yet it is entirely possible that there may be one or two of our colleagues who do not believe that clandestine intelligence activities should be conducted by a democratic or republican form of government—depending on which side one might be. That is true. Nevertheless, the number of such Senators would be very few.

The concern of the first amendment was very real. It was felt that there was no need to limit it legislatively. You cannot limit the first amendment legislatively. There is no way to do that.

Mr. CHAFEE. I thank the Senator.

Mr. President, I yield back the remainder of my time.

● Mr. KENNEDY. Mr. President, in light of the remarks of Senator CHAFEE and Senator SIMPSON this morning, I should like to explain briefly the action taken by the Judiciary Committee when it considered S. 2216, the Intelligence Identities Protection Act. The committee sought not to interfere with the bill's basic purpose—the protection of covert intelligence agents from disclosure. The committee introduced language designed to clarify the bill's intent, namely protecting the identity of such agents without interfering with legitimate press activity or rights protected by the first amendment to the Constitution.

The purpose of the bill is to protect CIA and other covert agents from injury caused by disclosing their names. The bill has two basic parts. The first part would make it a crime for people with access to classified information to disclose the names of covert agents. The second part would make it a crime to disclose the names of covert agents, even if the information comes from nonclassified sources.

It is this second part of the bill, as reported by the Intelligence Committee, that aroused the committee's concern. We felt that, as written, it risked unwarranted interference with press freedom. It risked chilling political debate which the Constitution requires to remain "uninhibited, robust, and wide-open." It did so, in our view, because it was drafted more broadly than needed to achieve its purposes. The Intelligence Committee's language might prevent the press from bringing to the attention of the public activity which may constitute a serious abuse of the CIA's authority—a coup d'etat, unlawful violence, or other wrongful acts. Yet, it is the very object of the first amendment to allow public debate about just such activities.

I am aware that the Intelligence Committee has tried to deal with this problem by limiting the second part of the bill to disclosures which are made "in the course of a pattern of activities" and made "with reason to believe" that they will "impair or impede the foreign intelligence activities of the United States." The problem with this language is that it is too broad and too vague. A newspaper would always have reason to believe that any disclosure, no matter how legitimate, could, in some way or other, interfere with intelligence activities. But, sometimes such disclosure is desirable, indeed necessary, when it is part of legitimate newsgathering activity. The public ought to be able to learn about unlawful or highly improper activity, even of the CIA similarly, the language of "pattern of activities" offers the press little protection. It is far too vague to give the press comfort.

It is hardly surprising, then, that the Judiciary Committee received numerous letters from constiutional authorities and other experts stating that this section of the bill was unconstitutional. The most recent letter, signed by 51 law professors, states that section 501(c) of the Intelligence Committee's bill, in their opinion, violates the first amendment. The Association of the Bar of the City of New York agrees. I am fully aware that other experts defend the provision as constitutional. Nonetheless, the Judiciary Committee believed it unwise to enact a bill with such serious constitutional problems.

In an effort to eliminate these problems, the Judiciary Committee sought to find language that would narrow section 501(c). We tried to avoid interfering with the bill's legitimate purposes. Rather, we sought to find language that would provide a basis for consensus among the two committees. We, therefore, took language from the Intelligence Committee's report on the bill and paced that language in the statute. The Judiciary Committee's main amendment states:

> It shall not be an offense under subsection (c) of section 501 if the disclosure of the information descriped in such subsection is an integral part of another activity such as news reporting of intelligence failures or abuses, academic study of Government policies and programs, enforcement by a private organization of its internal rules and regulations, or other activity protected by the first amendment to the constitution.

We also adopted three other important amendments.

Mr. President, the Judiciary Committee acted expeditiously. It reported the bill to the floor without delay. And, since it reported the bill, the committee's staff has been meeting with the staff of the Intelligence Committee, as well as with representatives of the Justice Department and the CIA in an effort to work out language that would constitute an acceptable substitute for our amendments—language which could provide the basis for an agreed upon floor amendment. I believe that several satisfactory alternatives have been suggested. I have urged the administration to examine them seriously. I believe it will be possible, with good faith on all sides, to reach agreement before Congress comes back into session. We shall then be able to enact a law which protects, not only CIA agents, but the first amendment, as well.

Mr. President, I submit for the RECORD letters from various scholars and news organizations regarding the constitutional issue raised by this legislation as well as my recent proposal which the Department of Justice is now considering.

SEPTEMBER 10, 1980.

MEMBERS OF THE JUDICIARY COMMITTEE,
U.S. Senate,
Washington, D.C.

DEAR SENATORS KENNEDY, BAYH, BYRD, BIDEN, CULVER, METZENBAUM, DECONCINI, LEAHY, BAUCUS, HEFLIN, THURMOND, MATHIAS, LAXALT, HATCH, DOLE, COCHRAN AND SIMPSON: We believe that Section 501(c) of S. 2216 and and H.R. 5615, which would punish disclosure of the identity of covert CIA and FBI agents derived solely from unclassified information, violates the First Amendment and urge that it be deleted as recommended by the House Judiciary Subcommittee on Civil and Constitutional Rights.

Chuck Abernathy, Professor of Law, Georgetown University Law School.
George Alexander, Professor of Law, University of Santa Clara Law School.
David Anderson, Professor of Law, University of Texas Law School.
Judith Areen, Professor of Law, Georgetown University Law School.
Charles E. Ares, Professor of Law, University of Arizona, College of Law.
Frank Askin, Professor of Law, Rutgers University School of Law.
Barbara Babcock, Professor of Law, Stanford University School of Law.
Elizabeth Bartholet, Professor of Law, Harvard University Law School.
Paul Bender, Professor of Law, University of Pennsylvania Law School.
Ralph S. Brown, Jr., Professor of Law, Yale University Law School.
Vern Countryman, Professor of Law, Harvard University Law School.
Alan Dershowitz, Professor of Law, Harvard University Law School.
Norman Dorsen, Professor of Law, New York University School of Law.
Steven Duke, Professor of Law, Yale University Law School.
Thomas I. Emerson, Professor of Law, Yale University Law School.
David B. Filvarff, Professor of Law, University of Texas Law School.
Jack Getman, Professor of Law, Yale University Law School.
Steve Gillers, Professor of Law, New York University School of Law.
Carole E. Goldberg-Ambrose, Professor of Law, University of California at Los Angeles Law School.
David Goldberger, Professor of Law, Ohio State University College of Law.
Morton J. Horwitz, Professor of Law, Harvard University Law School.
Louis A. Jacobs, Professor of Law, Ohio State University College of Law.
Arthur Kinoy, Professor of Law, Rutgers University School of Law.
John R. Kramer, Professor of Law, Georgetown University Law School.
Sanford Levinson, Professor of Law, University of Texas Law School.
Lance Liebman, Professor of Law, Harvard University Law School.
Jeffrey Meldman, Professor of Law, Massachusetts Institute of Technology.
Louis Menand, Professor of Law, Massachusetts Institute of Technology.
Frank Michelman, Professor of Law, Harvard University Law School.
Arvil Morris, Professor of Law, University of Washington-Seattle Law School.
Charles Nesson, Professor of Law, Harvard University Law School.
Richard Parker, Professor of Law, Harvard University Law School.
Daniel Partan, Professor of Law, Boston University Law School.
Willard H. Pedrick, Professor of Law, Arizona.
Leroy Pernell, Professor of Law, Ohio State University College of Law.
Michael Perry, Professor of Law, Ohio State University College of Law.
Daniel H. Pollitt, Professor of Law, University of North Carolina Law School.
Scot Powe, Professor of Law, University of Texas Law School.
John Quigley, Professor of Law, Ohio State University College of Law.
Douglas Rendleman, Professor of Law, College of William and Mary, Marshall-Wythe School of Law.
Rhonda R. Rivera, Professor of Law, Ohio State University College of Law.
Lawrence Sager, Professor of Law, New York University School of Law.
Louis Michael Seidman, Professor of Law, Georgetown University Law School.
Ed. Sherman, Professor of Law, University of Texas Law School.
Ed Sparer, Professor of Law, University of Pennsylvania Law School.
Charles Thompson, Professor of Law, Ohio State University College of Law.
Lawrence Tribe, Professor of Law, Harvard University Law School.
Pete Wales, Professor of Law, Georgetown University Law School.
Burton D. Wechsler, Professor of Law, American University Law School.
Bernard Wolfman, Professor of Law, Harvard University Law School.

HARVARD UNIVERSITY LAW SCHOOL,
Cambridge, Mass., September 8, 1980.

Hon. EDWARD M. KENNEDY,
Chairman, Committee on the Judiciary, U.S. Senate, Washington, D.C.

DEAR SENATOR KENNEDY: Thank you for inviting me to offer my views on § 501(c) of the Intelligence Identities Protection Act of 1980, S. 2216.[1] I believe that this provision, if made law, would violate the First Amendment.

There is no doubt, of course, that "the Executive [may] . . . promulgat[e] and enforc[e] . . . executive regulations[ ] to protect the confidentiality necessary to carry out its responsibilities in the fields of international relations and national defense." *New York Times Co.* v. *United States*, 403 U.S. 713, 729–30 (1971) (Stewart, J., joined by White, J., concurring). Nor is there any doubt that "Congress [may] . . . enact . . . criminal laws to protect government property and preserve government secrets." Id. at 730. But the First Amendment severely circumscribes the Government's power to achieve such ends by punishing journalists and other private citizens for repeating or publishing truthful information either (1) lawfully derived or deduced from information that has already found its way into "the public domain," *Cox Broadcasting Co.* v. *Cohn*, 420 U.S. 469, 495 (1975), or (2) innocently received as a "leak" from someone with access to classified, or otherwise confidential, government materials. *Landmark Communications, Inc.* v. *Virginia*, 435 U.S. 829, 837–46 (1978).

The need for secrecy in the foreign intelligence sphere is among the most pressing of governmental interests. *Cf. id.* at 849 n.* (Stewart, J., concurring in judgment). But this cannot obscure either the priority given by the First Amendment to "public scrutiny and discussion of governmental affairs," *id.* at 839 (majority opinion); *New York Times Co.* v. *Sullivan*, 376 U.S. 254, 269–70 (1964), or the correlative principle that no governmental restriction on "uninhibited, robust, and wide-open" political debate, *id.* at 270, is constitutionally acceptable *unless*—

(a) the restriction is designed to achieve a compelling governmental objective, and is narrowly drawn to achieve neither more nor less; and

(b) the restriction's enforcement in a given case is shown to be truly essential to achieve that compelling governmental interest.

See First National Bank v. *Bellotti*, 435 U.S. 765, 787 (1978); *In re Primus*, 436 U.S. 412 (1978); *Buckley* v. *Valeo*, 424 U.S. 1, 25 (1976) (per curiam).[2] Section 501(c) quite clearly fails to meet these tests.

The provision's proscriptions—which apply even when lawfully obtained, and even "disclosed" was lawfully obtained, and even when the only result of its suppression would be to stifle criticism or exposure of alleged governmental ineptitude or wrongdoing—are not limited to cases in which a judge or jury finds that "disclosure" of the information in question has harmed, or is likely to harm, the safety or security of any individual or the success of any specific lawful governmental undertaking. *Cf. Bridges* v. *California*, 314 U.S. 252, 263 (1941); *Pennekamp* v. *Florida*, 328 U.S. 331, 347 (1946); *Craig* v. *Harney*, 331 U.S. 367, 376 (1947); *Wood* v. *Georgia*, 370 U.S. 375 (1962). The provision at issue would impermissibly penalize unauthorized disclosures without requiring any such showing of actual or probable harm.

It is no answer that the disclosures for which § 501(c) prescribes punishment without requiring such a showing of injury are limited to disclosures made "in the course of a pattern of activities intended to identify and expose covert agents and with reason to believe that such activities would impair or impede the foreign intelligence activities of the United States." Indeed, the vague "pattern of activities" requirement demonstrates that the proposed law would be anything but closely fitted with the restriction's ostensible purposes. For disclosures of the identities of our covert agents and operatives abroad, however harmful or threatening, would not be forbidden under § 501(c) unless made "in the course of a [specified] pattern of activities," while revelations that do not imperil any individuals or operations would be punished under § 501(c) whenever made by persons tainted by their association with the forbidden "pattern of activities"—activities that, standing alone, might otherwise be wholly lawful and, in fact, themselves entitled to First Amendment protection. Thus it is also no answer that punishment is limited to disclosures made "in the course of [such] a pattern of activities" with knowledge "that the United States is taking affirmative measures to conceal [an] individual's clas-

[1] The provision reads as follows:

"(c) Whoever, in the course of a pattern of activities intended to identify and expose covert agents and with reason to believe that such activities would impair or impede the foreign intelligence activities of the United States, discloses any information that identifies an individual as a covert agent to any individual not authorized to receive classified information, knowing that the information so disclosed so identifies such individual and that the United States is taking affirmative measures to conceal such individual's classified intelligence relationship to the United States, shall be fined not more than $15,000 or imprisoned not more than three years or both."

[2] Thus, for example, despite the undisputed importance of preserving the confidentiality of a state's judicial disciplinary proceedings, *Landmark Communications, Inc., supra*, 435 U.S. at 834–36, not even the state's "interest in protecting the reputation of its judges, nor its interest in maintaining the institutional integrity of its courts is sufficient to justify . . . punishment of [unauthorized disclosure]," *id.* at 841, when such disclosure is made by "third parties" and consists of "truthful information regarding [the] confidential [judicial] proceedings." *Id.* at 837. The Supreme Court so held "even on the assumption that criminal sanctions do in fact enhance the guarantee of confidentiality," *id.* at 841, and even when the information at issue had been withheld by law from the public domain." *Id.* at 840.

sified intelligence relationship to the United States." Even under such circumstances—and assuming that any matter so vaguely defined can be "known"—§ 501(c) would not require the Government to prove any casual link between the culpable disclosure and a harm that would justify punishing it.

This mismatch between the Government's chosen means and its professed ends not only dooms § 501(c) on its face but also underscores doubts, independently generated by the provision's history, about its true aims, and, about those of § 501 as a whole. *Cf. First National Bank* v. *Bellotti*, 435 U.S. 765, 793 (1978). Needless to say, protecting the image and reputation of governmental officials and agencies, or the smooth operation of governmental programs immunized from public examination and critique, is insufficient justification "for repressing speech that would otherwise be free." *New York Times Co.* v. *Sullivan*, 376 U.S. 254, 272–73 (1964). Thus, for example, the provision's restrictions on disclosure cannot be justified by the Government's wish to preserve the CIA's "'plausible deniability,'" or to avoid "'political outcry'" over American covert operations in foreign countries, or otherwise to preserve, among other things, access "'to appropriate targets'" of recruitment abroad. *New York Times*, September 6, 1980, at 22, col. 1 (quoting testimony of Frank C. Carlucci, Deputy Director, CIA, before Senate Judiciary Committee on September 5, 1980). Such justifications bespeak purely political purposes beyond the Government's power to accomplish by stifling protected speech. Moreover, such congressional action, frankly targetting for special restrictions on First Amendment activities a readily identifiable group of private citizens—in this case, apparently a group of journalists associated with the *Covert Action Information Bulletin*—bears a distressing resemblance to past legislation whose purpose to punish dissenters or penalize partisans of defeated enemy causes was evident from the legislation's face or history—and which was hence invalidated by the Supreme Court as a forbidden *ex post facto* law or bill of attainder.[a]

For the reasons I have sought to articulate above, I believe that § 501(c) would violate the First Amendment if enacted. Accordingly, I recommend that at least this provision of § 501 be deleted from S. 2216.

Sincerely,

LAURENCE H. TRIBE.

YALE UNIVERSITY LAW SCHOOL,
New Haven, Conn., September 5, 1980.

HON. EDWARD M. KENNEDY,
U.S. Senate,
Committee on the Judiciary,
Washington, D.C.

DEAR SENATOR KENNEDY: This is in reply to your letter of August 26 asking me to comment on section 501(c) of S. 2216, now pending before your committee.

In my judgment Section 501(c) would seriously curtail freedom of expression in the United States and violates the constitutional right to freedom of speech and of the press as embodied in the First Amendment.

The essence of Section 501(c) is that it establishes a criminal penalty for the * * * of any information that identifies an individual as an undercover agent or informant of an intelligence agency. The prohibition applies not only to a government employee or former employee or to a person who has entered into a trust relationship with the government, but of any person, regardless of any connection with the government. The information which is forbidden to be disseminated is not only classified information, but information that is not classified, information readily available from non-governmental sources, and information already in the public domain. The provision extends not only to information that reveals the name of an undercover agent or informer but to any information that might tend to identify such a person in any way. It is rare that an account of a particular intelligence operation can be described or discussed without including information that may point to the identity of participants in that operation.

It is true that Section 501(c) contains limitations that narrow the application of the provision upon analysis, however, these limitations are themselves limited:

(1) Section 501(c) applies only where there is "a pattern of activities" intended to identify and expose covert agents. This is proposed as a major limitation, designed to exclude isolated, incidental, or unintended disclosures. But clearly it affords very little protection to persons wishing to criticize, expose, or discuss the operations of intelligence agencies. Literally, the phrase "pattern of activities" does not even require that there be an exposure of more than a single agent or informant; the process of discovering a secret agent or informant in itself would involve a set of "activities" that could constitute a "pattern." And usually the "pattern of activities" would be intended or found by a jury to be intended, to identify agents or informants. In other words a journalist, scholar, or political figure could hardly take much comfort from the "pattern of activities" requirement.

The fact is that a distinction between those who engage in exposure of intelligence operations as a major occupation, and an investigator who writes a single article, cannot be formulated. Nor would such a distinction avoid First Amendment problems.

(2) Section 501(c) is also limited to situations where the person charged with crime has "reason to believe that such activities would impair or impede the foreign intelligence activities of the United States." Yet this condition would virtually always be met where a journalist or scholar is undertaking a critical investigation of the workings of an intelligence agency. In every case where the government seeks to withhold information and that information escapes its grasp it can be said that the disclosure "impairs or impedes" the government operation.

(3) The provision is limited to the identification and disclosure of "covert agents." However, the definition of covert agent includes not only undercover agents and informants of the CIA, Department of Defense and FBI serving outside the United States or who have so served within the last 5 years.* It also includes all United States citizens who are undercover agents or informants in connection with the counterintelligence or counterterrorism operations in the United States of the FBI; and all aliens, inside or outside the United States, who are present or former undercover agents or informants of the intelligence agencies named. Thus all areas of "foreign intelligence" are covered. This includes all those domestic operations of the FBI which are classified by that agency as counterintelligence or counterterrorism. Since many individuals, associations, political parties, and other groups have some connection with foreign countries, or some information pertaining to foreign countries, the application of Section 501(c) to FBI operations in the United States is extensive.

(4) Section 501(c) also provides that disclosure be made by a person "knowing that the information disclosed . . . identifies an individual as a covert agent and that the United States is taking affirmative measures to conceal such individual's classified intelligence relationships to the United States." Again, this condition could easily be met in any prosecution, where the government is seeking to punish a person for publishing an account of an intelligence activity.

It is plain that Section 501(c) would impose substantial and widespread restrictions upon discussion of the operations of the intelligence agencies in the United States and abroad. Journalists, editors, and all members of the media would be subject to criminal penalties, up to 3 years in prison, for reporting any information about the "foreign intelligence" activities of the CIA, DOD or FBI which might lead anyone to identify a particular individual concerned. This would be true even if the individual in question had been guilty of the most heinous crimes. Scholars, research institutions, and other centers of learning would be subject to the same restraints. Ordinary citizens could not even engage in conversation where names were mentioned or identifying facts disclosed. A political organization infiltrated by undercover agents or informers could not even discuss the problem, publicly or privately. Moreover, even where the statute did not strictly apply, no one would know how far it would be extended, when a prosecution might be brought, or what a jury might decide. When one cannot say anything that might be construed to identify a particular government official, the right of citizens to investigate what their government is doing, to criticize its actions, and to seek democratic change becomes virtually impossible.

Most important of all, the restrictions in Section 501(c) apply to information that is unclassified, available to all, and already in the public domain. They apply regardless of whether the person charged has even been a government agent or employee, or had any relation of trust with the government. And they apply regardless of how many times, or under what earlier circumstances, the information has been previously revealed. In this latter respect, since a criminal penalty follows each dissemination of a particular piece of information, the provisions of Section 501(c) constitute a classic example of an official secrets act.

Under these circumstances it is plain that Section 501(c) violates both the letter and the spirit of the First Amendment. Free and open discussion of public issues lies at the heart of that constitutional guarantee. The fact that such discussion may "impair or impede" the operations of government is no justification for imposing restrictions upon the right of expression. The government may protect itself by penalizing interference with its functions through violent or coercive means. It can seek to safeguard legitimate government secrets by controlling its own officials, employees and agents. But it cannot forbid, curtail or interfere with the discussion of government affairs by private citizens.

More specifically, the Supreme Court has consistently held that the government cannot prohibit the dissemination of information that is publicly available or that has escaped its efforts to keep secret. Thus in *Cox Broadcasting Co.* v. *Cohn*, 420 U.S. 469 (1975), the Supreme Court dealt with a Georgia statute which prohibited the publication of the name of a victim of rape. The broadcasting station charged with violating this law had obtained the name from public records in the case. The Court held that the First Amendment precluded any

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[a] *See United States* v. *Brown*, 381 U.S. 437, 453, 455–56 (1965) (invalidating law prohibiting members or supporters of Communist Party from holding union office); *United States* v. *Lovett*, 328 U.S. 303, 315 (1946) (invalidating law barring those named as subversives in HUAC investigations from federal employment); *Ex parte Garland*, 71 U.S. (4 Wall.) 333 (1867) (invalidating law forbidding supporters of Confederate cause to practice law in federal courts); *Cummings* v. *Missouri*, 71 U.S. (4 Wall.) 277, 323 (1867) (invalidating law banning such persons from practice of any profession).

* The 5 year provision is not applicable to "informants" who are United States citizens.

liability on the part of the broadcasting station. The Court explained:

"The freedom of the press to publish that information appears to us to be of critical importance to our type of government in which the citizenry is the final judge of the proper conduct of public business. . . . At the very least, the First and Fourteenth Amendments will not allow exposing the press to liability for truthfully publishing information released to the public in official court records. If there are privacy interests to be protected in judicial proceedings, the States must respond by means which avoid public documentation or other exposure of private information." (pp. 495–496).

In accord, with respect to the publication of the names of juvenile delinquents, where the information was obtained from monitoring police band radios and from interviewing witnesses, is *Smith* v. *Daily Mail Publishing Co.*, 443 U.S. 97 (1979).

Likewise, in *Landmark Communications, Inc.* v. *Virginia*, 435 U.S. 829 (1978), the Supreme Court had under consideration a Virginia statute which imposed a criminal penalty upon any person who divulged information concerning the proceedings of the Virginia Judicial Inquiry and Review Commission, a state tribunal empowered to hear complaints about the disability or misconduct of judges. A Virginia newspaper, which had obtained its information by lawful means, was convicted under the statute for publishing material about an inquiry pending before the Commission and identifying the judge under investigation. The Court reversed the conviction as a violation of the First Amendment.

"The operation of the Virginia Commission, no less than the operation of the judicial system itself, is a matter of public interest, necessarily engaging the attention of the news media. The article published by Landmark provided accurate factual information about a legislatively authorized inquiry pending before the Judicial Inquiry and Review Commission, and in so doing clearly served those interests in public scrutiny and discussion of governmental affairs which the First Amendment was adopted to protect." (p. 839).

Again, a similar situation was presented in *Linmark Associates, Inc. v. Willingboro*, 431 U.S. 85 (1977). Here the prohibition against dissemination of public information consisted of a town ordinance forbidding the display of "For Sale" or "Sold" signs on residential property. The aim of the ordinance was to prevent panic selling and white flight to the suburbs. The Supreme Court, in striking down the ordinance, analyzed the "constitutional defect" in the following terms:

"The Township Council here . . . acted to prevent its residents from obtaining certain information. That information, which pertains to sales activity in Willingboro, is of vital interest to Willingboro residents, since it may bear on one of the most important decisions they have a right to make: where to live and raise their families. The Council has sought to restrict the free flow of this data because it fears that otherwise, homeowners will make decisions inimical to what the Council views as the homeowners' self-interest and the corporate interest of the township: they will choose to leave town. . . . If dissemination of this information can be restricted, then every locality in the country can suppress any facts that reflect poorly on the locality, so long as a plausible claim can be made that disclosure would cause the recipients of the information to act 'irrationally.'" (p. 96).

Quoting an earlier case the Court concluded:

"There is . . . an alternative to this highly paternalistic approach. That alternative is to assume that information is not in itself harmful, that people will perceive their own best interest if only they are well enough informed, and that the best means to that end is to open the channels of communication rather than to close them. . . . But the choice among these alternative approaches is not ours to make or the Virginia General Assembly's. It is precisely this kind of choice, between the dangers of suppressing information, and the dangers of its misuse if it is freely available, that the First Amendment makes for us."

It is argued that Section 501(c) can be reconciled with the First Amendment on the theory that the government's interest in national security outweighs the admitted invasion of First Amendment rights. It is by no means clear that the Supreme Court should, or would, apply a balancing test in a case where the statute undertakes to penalize the publication of information that is in the public domain. See, e.g., *Linmark Associates, Inc.* v. *Willingboro*, supra, *Miami Herald Publishing Co.* v. *Tornillo*, 418 U.S. 241 (1974). Even if it were to do so, however, the Court would uphold Section 501(c) only if it determined that national security interests "overwhelmed" the First Amendment interests, *and* only if no other method was available for the government to protect its foreign intelligence operations. It would appear doubtful that the government could make either showing, much less both. The impact on First Amendment rights is drastic and extensive, whereas the interference with intelligence activities has been occasional and not decisive. The intelligence agencies have managed to function until now without benefit of the criminal sanctions here requested. Moreover, as S. 2216 itself recognizes in Section 503, there are other methods, including arrangements for more effective cover, to deal with the problem.

My conclusion is that, both as a matter of constitutional mandate and as a matter of policy, Section 501(c) should be rejected. Once our nation accepts the proposition that the First Amendment can be overriden by the routine demands of national security there is no end in sight. The whole system of freedom of expression would be endangered.

You also have requested me to comment on the proposal of Senator Bayh to narrow the provisions of Section 501(c). This amendment would require an intention to impair and impede foreign intelligence activities by identifying and exposing covert agents, rather than merely requiring "reason to believe" that disclosure would have that effect. While Senator Bayh's proposal would demand some additional proof by the government it would not, in my judgement, appreciably lessen the infringement upon First Amendment rights. Citizens have the right to criticize and expose government activities whether or not they intend to impair or impede them.

Your third question concerns the constitutionality of the "born classified" concept. For reasons already stated, such an approach seems to be an unprecedented violation of First Amendment principles.

Sincerely,

THOMAS EMERSON.

THE UNIVERSITY OF CHICAGO,
THE LAW SCHOOL,
Chicago, Ill., September 4, 1980.

Senator EDWARD M. KENNEDY,
Committee on the Judiciary,
U.S. Senate, Washington, D.C.

DEAR SENATOR: I am more than happy to offer my thoughts on S. 2216, uncertain though they may be. S. 2216 is a carefully drafted, thoughtfully considered attempt to deal with an unquestionably serious problem. It is not, however, free of constitutional doubt. Although the bill certainly seems "reasonable" on its face, this is not dispositive, for the Supreme Court long ago abandoned the use of *ad hoc* inquiries as to mere "reasonableness" as an appropriate means of first amendment interpretation.

Moreover, any effort of government to suppress the publication or disclosure of *truthful* information about governmental affairs must be approached with extreme skepticism. Indeed, in the entire history of our nation, there is not a single instance in which the Supreme Court has actually upheld such a prohibition, and one is tempted to conclude that such suppression is *per se* inconsistent with the premises underlying the first amendment. At the same time, however, the Court has indicated in *dictum* on several occasions that such restraints might, in extraordinary circumstances, be permissible. See, *e.g.*, *Near* v. *Minnesota*, 283 U.S. 697 (1931) (statement in *dictum* that prior restraint on disclosure of troop movements in wartime might be constitutional).

The bottom line, then, is that there is no direct precedent governing the constitutionality of this legislation, and there is no simple formula or set of formulae that one can mechanistically apply to obtain an easy answer. It is clear, though, that such suppression, if ever constitutional, is valid in only the most carefully defined, narrowly circumscribed, and most compelling of circumstances.

In assessing the constitutionality of S. 2216, then, it will be useful to focus on three separate, but not unrelated, considerations. First, there is the "value" of the speech suppressed. Any inquiry into the "value" of expression is of necessity problematic, but the Court has in the past undertaken such inquiries (*e.g.*, obscenity, libel, fighting words) and a case can be made for their legitimacy. From that perspective, S. 2216 can at least arguably be said to focus on speech that is of only "marginal" first amendment value. So long as the bill applies only to the exposure of agent identities, and so long as the agents whose identities are disclosed are not themselves alleged to have engaged in any especially newsworthy activities so as to make their identities of special public concern, there seems little public need for the information. Although the public may have an interest in learning about the *types* of persons who serve in these capacities and about their general activities, there would seem ordinarily to be no appreciable interest in learning the specific identities of the agents. As in the invasion of privacy context, where lower courts have tended to permit restrictions on speech involving non-newsworthy individuals, the mere identities of the agents seems ordinarily of relatively slight first amendment value. This is, of course, a tricky judgment as applied to *governmental* officials, but the analogy is not unhelpful.

This does not end the matter, however, for the question remains whether S. 2216 is sufficiently limited to take advantage of this analogy. Suppose, for example, Congress enacted a law prohibiting the disclosure of agent identities *even when* the "speaker" believed the agent to have acted unconstitutionally or otherwise unlawfully. Such a law would, in my view, violate the first amendment. As a general proposition, government may not, consonant with established principles of free expression, prevent disclosure of its own wrongdoing, except *perhaps* in the most extraordinary circumstances. This seems also to be the view of the Committee. (See Report at pp. 16, 18). How, then, does S. 2216 fit into all this. The Report maintains that the bill is not designed to "affect the First Aemndment rights of those who disclose the identities of agents as an integral part of another enterprise such as news media reporting of intelligence failures or abuses, academic studies of U.S. government policies and programs, or a private organization's enforcement of its internal rules." (Report at p. 18).

Unfortunately, S. 2216 does not explicitly embrace such a limitation. Rather, as drafted, it relies solely upon the "pattern of activities" clause to limit the bill's scope. This is inadequate. The clause is ambiguous and is subject to easy manipulation. Moreover, it might (and probably would) cover a newspaper or other publication that made a regular practice of investigating undercover activities in order to expose abuse. In short, S. 2216 seems to me insufficiently precise in this regard to satisfy the demands of the first amendment.

The Bayh substitute, by requiring an intent "to impair or impede the foreign intelligence activities of the United States," is preferable. Although the intent requirement may in operation generate some unwanted loopholes, it also provides at least *some* assurance that the law will be applied only to those who are the intended targets of the legislation—"those who make it their business to ferret out and publish the identities of agents" with an eye toward frustrating legitimate governmental activity. (Report at p. 18). In this light, the Bayh substitute seems not only preferable, but constitutionally essential if the legislation is to comport with the first amendment.

The second consideration that should be taken into account is the strength and nature of the government's interest. According to the Report, disclosures of the sort prohibited by S. 2216 have the potential (1) to place intelligence personnel and their families in physical danger; (2) to undermine the effectiveness of trained agents by "blowing" their cover; and (3) to create a sense of distrust on the part of foreign sources, thus chilling their willingness to cooperate with American agents. (See Report at pp. 8–9). No doubt all of those effects *do* occur. But surely they do not occur *every* time an agent's identity is disclosed. And although the bill is apparently drafted with an eye towards limiting its overbreadth in this regard, the overbreadth remains. There will, in other words, be some circumstances in which the bill would authorize conviction even though no substantial harm actually resulted from the disclosure.

By analogy, in the "incitement" context, the Court has held that even express incitement to crime may not constitutionally be punished unless, on the facts of the case, there was a likely and imminent danger that the speech would bring about some actual harm to the State. See *Brandenburg* v *Ohio*, 395 U.S. 444 (1969). Similarly, in this context, it may be necessary that prosecution be limited to only those instances in which disclosure is likely to bring about an imminent harm of the sort identified above. Although proof would no doubt be difficult, it should not be easy for government to suppress truthful information about its affairs.

Third, there is the question whether the suppression is "necessary" to achieve the government's underlying goals. Put another way, is the legislation the "least restrictive means" of reaching the desired end? In *Nebraska Press Association* v. *Stuart*, 427 U.S. 539 (1976), the Court held that government could not suppress the revelation of "confidential" information unless it had first exhausted all less restrictive means of preventing disclosure. Although *Stuart* involved a prior restraint, the same principle is applicable here as well.

By prohibiting anyone with authorized access to classified information to disclose agent identities, S. 2216 goes a long way toward meeting this requirement. As the Report notes, however, in at least some instances the information is obtained through surveillance and investigative techniques that do not involve access to classified information. To the extent this is true, it may be that the bill should make *those* activities criminal *before* it attempts to prevent publication, on the theory that criminalizing the information-gathering techniques is a less restrictive pay of dealing with the underlying problem. This seems, however, a rather minor objection.

Finally, it does not seem to me that the bill must constitutionally be limited to only those disclosures that derived from classified documents. So long as the harm to the government is demonstrated and the information cannot be said to have entered the "public domain," I see no constitutional objection to the "born classified" concept.

In sum, then, legislation directed against these sorts of abuses can at least conceivably be constitutional, but S. 2216 clearly needs further refinement and narrowing if it is to come even closer to passing constitutional muster.

Although you have not solicited my opinion as to the wisdom, as opposed to the constitutionality, of such legislation, I feel constrained to state simply that the constitutionality of suppression does not establish that it is good policy. The enactment of S. 2216 can lead to the adoption of similar laws by state and local governments concerned about protecting the confidentiality of their undercover operatives. And this can in turn lead to further efforts to suppress disclosure of "confidential" governmental information. There is always a risk in letting the cat out of the bag, and in this area, perhaps more than in any other, a sense of caution and self-restraint, even beyond that called for by the Constitution, is always good policy.

Due to the shortness of time, many of the views expressed herein are tentative, at best. I hope they are nonetheless of some assistance. Should you have any further desire for my advice on this matter, please feel free to call on me at any time.

Sincerely yours,

GEOFFREY R. STONE,
Professor of Law.

PHILIP B. KURLAND,
Chicago, Ill., September 25, 1980.

HON. EDWARD KENNEDY,
Chairman, U.S. Senate Committee on the Judiciary, Washington, D.C.

DEAR SENATOR KENNEDY: In response to your request, I can frame my opinion on the constitutionality of § 501(c) very precisely. I have little doubt that it is unconstitutional. I cannot see how a law that inhibits the publication, without malicious intent, of information that is in the public domain and previously published can be valid. Although I recognize the inconstancy and inconsistency in Supreme Court decisions, I should be very much surprised if that Court, not to speak of the lower federal courts, were to legitimize what is, for me, the clearest violation of the First Amendment attempted by Congress in this era.

With all good wishes,

Sincerely yours,

PHILIP B. KURLAND.

AMERICAN SOCIETY
OF NEWSPAPER EDITORS,
September 16, 1980.

HON. EDWARD M. KENNEDY,
Chairman, Senate Judiciary Committee,
Dirksen Senate Office Building,
Washington, D.C.

DEAR MR. CHAIRMAN: I write to you in my capacity as President of the American Society of Newspaper Editors. The Society represents more than 850 directing editors of daily newspapers throughout the United States.

ASNE is committed to the proposition that the press has an obligation, flowing from its privileged position under the First Amendment to the United States Constitution, to provide complete and accurate reports on the performance of all branches of government—reports upon which citizens may base reasoned and informed decisions on public affairs. We believe history makes clear that reporting on activities of intelligence agencies has in many cases been essential to important public-policy decisions.

In this regard we are concerned about the reach of S. 2016, the Intelligence Identities Protection Act. We have no quarrel with the intent of the bill, but we believe it casts too wide a net.

In particular, Section 501(c) of S. 2216 is fatally flawed from a constitutional standpoint because it appears to allow prosecution and punishment of those who publish unclassified information that is in the public domain. We believe that this bill must be revised to make clear that it does not apply to the distribution of news and other constitutionally protected forms of speech, including books.

We believe that unless both the language of the bill and its legislative history make absolutely clear that it is not intended to punish those who publish unclassified information that is in the public domain, it will be of doubtful constitutionality.

ASNE and its members appreciate the difficulty of constructing legislation that gives the government adequate tools to halt purposeful disclosure of agents and informers names without infringing the constitutional guarantees of free speech and press. One possible approach, as we and other groups suggested earlier, would be to limit any criminal liability to those who have or have had access to classified information.

Sincerely,

THOMAS WINSHIP,
President.

NATIONAL NEWSPAPER ASSOCIATION,
September 9, 1980.

HON. EDWARD M. KENNEDY,
Chairman, Judiciary Committee, U.S. Senate,
Washington, D.C.

DEAR MR. CHAIRMAN: We are writing to you as representatives of several media organizations which are seriously concerned with section 501(c) of S. 2216, the Intelligence Identities Protection Act. In our opinion, section 501(c) is fatally flawed from a constitutional standpoint, impinging upon First Amendment rights in a manner which may be unprecedented.

Our organizations are committed to the proposition that the media have an obligation, flowing from their privileged position under the First Amendment, to provide complete and accurate reports on the performance of all branches of government—reports upon which citizens may base reasoned and informed decisions on public affairs. We believe history makes clear that reporting on activities of intelligence agencies has in many cases been essential to important public policy decisions.

The members of the media have no quarrel with the aims of securing American intelligence gathering and protecting the lives of American intelligence agents and their families, but we believe that the constitutional principles upon which our commitment is founded cannot be sacrificed to their achievement. Hence, while we recognize that many Members and staff of both Houses of Congress have attempted to reconcile these legislative imperatives, in our opinion, it has not been accomplished, and perhaps cannot be.

The overriding deficiencies of substantial concern to our organizations are that section 501(c) may well reach the dissemination of news and other constitutionally protected forms of speech, and that it fails to distinguish between classified and unclassified information as a source for exposing agents' identities.

Potential foreseeable consequences stem-

ming from the wording of this section include the prosecution and punishment of members of the media and others who identify an intelligence agent—including Federal Bureau of Investigation agents involved in foreign counterintelligence and counterterrorism and who, in the course of official duties, has committed an unconstitutional or unlawful act, or has clandestinely violated a presidential foreign policy. Moreover, it may be that an intelligence agent could not even identify him—or herself when discussing any matter, classified or not, with members of the media, historians or anyone else without authorization.

One specific troubling aspect of section 501(c)'s wording is the adoption of a "pattern of activities" standard. A "pattern of activities," when applied to a journalistic endeavor, could be discerned from several stories critical of an intelligence agency, or, indeed, within the confines of preparing for one story. The intent standard appended to it does not ease the situation for, on many occasions, the intent of the story is to expose agents who have abridged law or presidential policy. "Reason to believe" must be interpreted as a far lesser standard than intent, and can be demonstrated on a far lesser display of proof. In our view, these standards would undermine and chill—perhaps to the point of freezing—surely criticism of, and possibly any informed and robust public debate about an intelligence agency's programs, objectives or directions.

Further, there is no standard included in section 501(c) requiring a showing of "direct, immediate and irreparable harm" to national security or a "clear and present danger" thereto, or a similar test. Absent some such standard, it is difficult to see any consistency with prior limitations on First Amendment rights found to be constitutional.

With these thoughts in mind, we must ask what would have been the impact on the public's right to know had this section been enacted at the time of the release of the Pentagon Papers, or inquiries into the Watergate burglary or the CIA's activities within the United States? Certainly, it would have raised a formidable barrier to the type of effective reporting which was the hallmark of these cases and the conduit of necessary information to the public.

We strongly believe that rushing to judgment on this bill in the emotional aftermath of the recent Jamaica incident will only obscure the implications for the equally compelling constitutional interest. Therefore, we respectfully urge you to deliberate on this measure thoroughly and carefully, and accord appropriate weight to the preservation of full First Amendment rights.

Thank you.

Sincerely,

WILLIAM C. ROGERS, Sr.,
President,
National Newspaper Association.

RICHARD P. KLEEMAN,
Vice President, Washington Association of American Publishers.

CHARLES W. BAILEY,
Chairman, Freedom of Information Committee, American Society of Newspaper Publishers.

CURTIS J. BECKMANN,
President, Radio Television News Directors Association.

CLEMENS P. WORK,
Staff Attorney, The Reporters Committee for Freedom of the Press.

ROBERT D. G. LEWIS,
Chairman, Freedom of Information Committee, Society of Professional Journalists, Sigma Delta Chi.

THE ASSOCIATION OF THE BAR,
OF THE CITY OF NEW YORK,
New York, September 10, 1980.

Re S. 2216

Senator EDWARD F. KENNEDY,
Chairman, Senate Judiciary Committee,
U.S. Senate,
Washington, D.C.

DEAR SENATOR KENNEDY: Earlier this year, this Committee studied the various proposed intelligence charters and prepared a detailed report which will shortly be distributed to the Congress. Pending that distribution, I am writing to you concerning S. 2216, which is currently before your Committee.

S. 2216 would make it a crime to disclose publicly the identity of former or present undercover intelligence agents. While we support such legislation in principle, it is our Committees' view, after careful and extensive study, that S. 2216 in its present form is not consistent with the First Amendment to the United States Constitution. Any such criminal prohibition should be limited to the disclosure of classified information and criminal penalties should be imposed only upon persons having authorized access to such classified information.

S. 2216 (§ 501(c) does not limit criminal liability to disclosure of classified information and would subject a broad range of persons, particularly members of the press, to prosecution. In addition, it is quite broadly drafted, using language that is incapable of being clearly interpreted, as any criminal prohibition must be. In our considered view, such a broad sweep to the statute would render it unconstitutional under both the First Amendment and the Due Process clause of the Fifth Amendment, and undesirable as a matter of sound public policy. As the Supreme Court has repeatedly recognized, the media have the right to publish "whatever information the media acquires" (*Houchins* v. *KQED, Inc.*, 438 U.S. 1, 13–14 (1978) (Burger, C.J.)). We do not think that this exercise of constitutional rights should be chilled by uncertainty as to whether a publication, even if motivated by the very best and purest ideals of American journalism, might later be found to have been published in violation of an overbroad and imprecise criminal statute which is capable of being interpreted far beyond the sponsor's intentions.

In our Committee's view, § 701 of S. 2284 as originally drafted, and § 202 of H.R. 6820 contain preferable formulations of legislation in this area. I enclose an excerpt from our report which discusses these alternatives and S. 2216 in greater detail.

If you or members of the Judiciary Committee would like any additional information on this matter, please feel free to call upon me.

Respectfully,

STEVEN B. ROSENFELD.

EXCERPT FROM "THE NATIONAL INTELLIGENCE ACT OF 1980: AN EVALUATION AND AN EPITAPH"

D. Prohibiting Disclosure of Identities of Undercover Intelligence Agents.—

We fully understand, and support, a provision which attaches criminal penalties to the public disclosure of the identities of present and former undercover intelligence agents, informants and operatives. We think that both § 701 of § 2284, as originally drafted, and § 202 of the Aspin bill properly met this need, unlike the Moynihan bill, which we think went much too far.

We do have one substantial area of disagreement with § 701 of the original S. 2284. That section would have permitted prosecution (for publicly disclosing the identities of intelligence agents) of anyone "knowing or having reason to know that the information disclosed so identifies such individual . . ." (emphasis added). In our view, the "having reason to know" standard was far too vague and broad, and should have no place in a criminal statute. We prefer the formulation contained in § 202 of the Aspin bill, which permitted prosecution only when the individual made the disclosure "knowing" that the information revealed the identity of an intelligence operative.

In general, we believe that the criminal prohibition should be limited to the disclosure of classified information and that criminal penalties should be imposed only upon persons having authorized access to such classified information, and not to others (such as news media and publishers) who might exercise their First Amendment rights to publish information revealed to them. Section 701(c) of original S. 2284 made clear, we think, that there was no intent that any such persons be prosecuted for the exercise of their First Amendment rights under theories such as aiding and abetting, conspiracy or misprision of felony.

By contrast, the Moynihan bill (S. 2216), as introduced, was objectionable because (1) it did not limit criminal liability to disclosure of classified information and (2) it would have subjected persons to prosecution for aiding and abetting, conspiracy and misprision of felony, if it could be shown that they "acted with the intent to impair or impede the foreign intelligence activities of the United States." We do not think that an exercise of First Amendment rights should be chilled by uncertainty as to whether the publication might later be found to have been committed with such intent.

Finally, we approve of the additional defense in § 701(d) of original S. 2284 that "it shall not be an offense" under this section "to transmit information directly to the House Permanent Select Committee on Intelligence or to the Senate Select Committee on Intelligence." That safeguard provided not only a brake upon overzealous prosecution, but would have added yet another stone to Senator Huddleston's "foundation" of congressional oversight.

COMMITTEE ON THE JUDICIARY,
Washington, D.C., September 29, 1980.

Hon. CHARLES RENFREW,
Deputy Attorney General,
U.S. Department of Justice,
Washington, D.C.

DEAR JUDGE RENFREW: As you know, the Judiciary Committee recently reported a bill to protect CIA agents from unauthorized disclosure of their identities. The Judiciary Committee amended the Intelligence Committee's version of that bill because it feared that the bill as written threatened unnecessarily to interfere with Freedom of the Press. The Judiciary Committee sought to avoid a serious First Amendment problem.

During the past week the staffs of the Judiciary Committee and the Intelligence Committee have met and tried to resolve the differences between the two versions. They have tried to find language that would help to protect the bill from Constitutional attack without interfering with the bill's basic purpose—the protection of covert agents. Any such agreed upon language could be offered as a floor amendment as a substitute for the Judiciary Committee's amendments; it would help to secure speedy enactment of the bill into law.

In an effort to break the impasse over language, my staff has provided your staff with a proposal. For your convenience, a copy is attached.

I believe that agreement on language of this sort or acceptance of a modified version

of Judiciary Amendment No. 3 would resolve the controversy surrounding the bill and would lead to its speedy enactment. Because of the time problem produced by the end of the session, I should appreciate a response setting forth the Administration's views at the soonest possible time.

Thank you very much for your help.

With best wishes,

EDWARD M. KENNEDY.

STAFF PROPOSAL

1. The version of "c" attached.
2. The report language attached.
3. Section 503 dropped.
4. "Covert agent" redefined for purposes of "c" to include only persons working for the United States abroad.
5. The following sentence added:

"The provisions of this title shall be construed so as not to inhibit the exercise of any right protected by the First Amendment to the Constitution."

6. The Judiciary amendments dropped with the possible exception of an "expedited court test" amendment (though no expansion of "standing.").

"IMPAIR OR IMPEDE"—JEOPARDY

(c) Whoever, in the course of a pattern of activities undertaken for the purpose of uncovering the identities of covert agents and exposing such identities (1) *in order to impair or impede the effectiveness of covert agents or the activities in which they are engaged by the fact of such uncovering and exposure, or* (2) *with reckless disregard for the safety of covert agents* discloses any information that identifies an individual as a covert agent to any individual not authorized to receive classified information, knowing that the information disclosed so identifies such individual and that the United States is taking affirmative measures to conceal such individual's classified intelligence relationship to the United States, shall be fined not more than $15,000 or imprisoned not more than three years, or both.

REPORT LANGUAGE

In agreeing to strike section 502(e) and to amend section 501(c) we are acting with a common understanding on the scope of section 501(c) among the sponsors of the bill and the Administration.

Taken as a whole the section requires a series of acts having a common purpose or objective and designed, first, to make a systematic effort at uncovering covert agents and, second, to expose such agents publicly with the intent that the disclosure itself directly impairs the effectiveness of the agents identified or their activities or that the disclosure is made with reckless disregard for their safety. The gratuiteous listing of agents' names in certain publications goes far beyond information that might contribute to informed public debate on foreign policy or foreign military intelligence activities. That effort to uncover the identities of covert agents by overcoming government efforts to conceal the identities of U.S. intelligence officers and agents in countries throughout the world and to expose their identities repeatedly, time and time again, serves no legitimate purpose.

The standard adopted in section 501(c) applies criminal penalties only in very limited circumstances to deter those who make it their business to ferret out and publish the identities of agents. At the same time, it does not affect the First Amendment rights of those who act for another purpose such as news media reporting of intelligence failures or abuses, academic studies of U.S. government policies and programs, or a private organization's enforcement of its internal rules, which are protected by the First Amendment.

We share the objectives expressed by the Attorney General when he wrote to the Intelligence Committee to emphasize "the great importance" of this legislation.

While we must welcome public debate about the role of the intelligence community as well as other components of our government, the wanton and indiscriminate disclosure of the names and cover identities of covert agents serves no saluatory purpose whatsoever.

The language makes clear what was the stated intent of the drafters of the versions of 501(c) reported by the Intelligence and Judiciary Committees, i.e., that the bill reach only those who are in the business of naming names and not those engaged in protected First Amendment activity. It is our common purpose to preclude the possibility that casual political debate, the journalistic pursuit of a story on intelligence, or the disclosure of illegality or impropriety in government will be chilled by enactment of the bill.

The language has been carefully drafted to make criminal disclosures which clearly represent a conscious and pernicious effort to expose agents with the intent that the disclosure itself will directly hinder the activities of the agents whose identities are exposed. If the pattern of activities were engaged in for another purpose the statute would not reach the individual even if he knew that his conduct would have the effect of directly impairing the activities of the agents whose identities are exposed or their effectiveness. On the other hand, if one had the intent to impair or impede the effectiveness of cover agents or the activities in which they are engaged directly by the fact of such uncovering or was acting in reckless disregard for the safety of covert agents, it would not matter if one also had another purpose.

One would be covered by the statute.

The pattern of activities in which the individuals are engaged must have as its purpose the impairing of the activities of the agents who are exposed or of their identities through the very act of exposure. The individual must be taking the law into his own hands by posing a direct and immediate obstruction to the exposed agents effectiveness. The necessary pattern of activities coupled with the necessary intent to impair or impede would not be demonstrated by one who discloses identities of undercover employees as an integral part of another enterprise such as news media reporting of intelligence failure or abuses, academic studies of U.S. government policies and programs or a private organization's enforcement of its internal rules.

The description of the meaning of the phrase "undertaken for the purpose of uncovering the identities of covert agents and exposing such identities" has the meaning ascribed to it in the Report of the Senate Judiciary Committee on pp. ———. This portion of the report reads as follows:

The Committee substituted the phrase "undertaken for the purpose of uncovering the identities of covert agents and exposing such identities" for the phrase "to identify and expose covert agents."[1] This was done to make clear the intended meaning of the language. The person must be engaged in an enterprise whose purpose he or she knows and intends to be the uncovering of the identities of covert agents for its own sake. The uncovering cannot be part of another activity and incidental to that activity.

Moreover the individual must ferret out the names by a process of deliberate and systematic search. If the individual's pattern of disclosures involves the republication or the disclosure of information readily available to the person, then the individual is not engaged in the necessary pattern of activities whose purpose is to uncover identities which the government is seeking to conceal. The pattern of activities must amount to an effort to ferret out information which the government is making efforts to conceal by employing techniques such as surveillance of American officials, unauthorized access to classified information, or the piecing together of clues from multiple published sources. In some cases, a name might be "uncovered" by being read in a journal of limited circulation or being revealed in a private conversation. However, an individual would not be engaged in the necessary "pattern of activities" unless he read the journal or engaged in the conversation as part of a systematic effort to uncover identities which the government is seeking to conceal.

The process of "uncovering" covert agents must involve a substantial effort to ferret out names which the government is seeking to keep secret. This process of uncovering names must involve much more than merely restating that which is in the public domain. The process of uncovering names must include techniques like: (1) seeking unauthorized access to classified information, (2) a comprehensive counterintelligence effort by engaging in physical surveillance, electronic surveillance abroad and other techniques of espionage directed at undercover intelligence employees, or (3) collating information from multiple documentary sources. CIA Deputy Director Carlucci in describing the activities of a particular group illustrated what the Committee intends by the term "uncover":

"[T]hey are engaged in an elaborate and sophisticated operation involving the collating of information from multiple documentary sources and the penetration of U.S. official establishments. There is no reason why, in addition to cultivating sources in the State Department, embassies and consulates, they cannot engage in physical surveillance, electronic surveillance abroad or any other form of investigative technique. Unlike the intelligence agencies, they have no legal constraints on the use of physical surveillance and no constraints on any investigation they may conduct of U.S. persons abroad. Basically what is described in Dirty Work II is very little different from the kind of counterintelligence operations that one might expect a hostile intelligence service to mount against us.

". . . the activities that these bills attempt to deal with are a systematic, purposeful job of uncovering identities."[2]

The language of the phrase to be added to the bill by the floor amendment, i.e., "in order to impair or impede the effectiveness of covert agents or the activities in which they engage by the fact of such uncovering and exposure, or (2) with reckless disregard for the safety of covert agents," has been carefully crafted with the full agreement of the Administration and members of the Senate Select Committee on Intelligence and the Senate Judiciary Committee and has a meaning agreed to by the sponsors of the bill and the Administration.

The phrase "in order to" has the same meaning as the phrase "for the purpose of" i.e., the pattern of activities must be for the purpose of impairing or impeding in the manner described. It is not enough that one knows or is willing to have the injury described take place. The individual must will that a particular act take place. The distinction is that described in the report of the Judiciary Committee on the criminal

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[1] The Administration indicated in a letter to the Committee that it had no objections to the substitution. Letter from Deputy Attorney General Charles B. Renfrew to Senator Edward M. Kennedy, September 17, 1980.

[2] Statement of Frank C. Carlucci, Deputy Director of Central Intelligence, on S. 2216, before the Senate Committee on the Judiciary, September 5, 1980, p. 8.

code and quoted on p. 22 of the Select Committee Report.

The phrase "impair or impede the effectiveness of covert agents or the activities in which they are engaged" is a significant change in the language from that which appears in the section as reported by the two committees which is "impair or impede the effectiveness of the foreign intelligence activities of the United States." The change was made to make clear that the pattern of activities must be intended to directly impair the effectiveness of the particular agents whose identities the individual is seeking to uncover and expose or the specific activities in which the particular agents are engaged. If one's intent is to impair the effectiveness of intelligence activities in general he would not be covered by the statute. Thus one could have the requisite intent only if he disclosed the identity of a covert agent who was actively engaged in specific intelligence activities at the time of the disclosure or who had so recently engaged in such activity that the exposure of his identity exposed operations in which he had recently been engaged.

The entirely new phrase "by the fact of such uncovering and exposure" was added for the purpose of incorporating into the statute itself the fundamental distinction between those who the statute intends to reach and those who would be beyond its coverage.

The revised section 501(c) as a whole and in particular the phrase "by the fact of such uncovering and exposure" should be read to make it clear that:

"... § 501(c) does not seek to prohibit discussion generally, but is directed at the individual who takes it upon himself to bring intelligence activity to a halt and who does this, not by urging a change in public law or policy, but by ferreting out the identities of individuals who are involved in intelligence activities and by disclosing those identities with the intent the intelligence functions will be disrupted by the disclosure itself." [3]

An individual who intends by the fact of disclosure itself to impair or impede does not offer information or ideas for "uninhibited, robust and wide-open" public debate or discussion. *New York Times Co.* v. *Sullivan*, 377 U.S. 255, 270(1964). Instead, he deliberately used the disclosure of names, the intentional "blowing of cover," to engage in guerilla warfare in order to prevent or disrupt activities of which he disapproves. He is, in effect, a counter-intelligence agent who uses the disclosure of names as an act of sabotage.

One must intend that the impairing or impeding be the direct result of the disclosure and affect the activities of the agent in the country in which he is operating through actions which occur directly in that country, for example the expulsion of the agent by the foreign government, his arrest, or the refusal of his "assets" to work with him. One is not covered if he seeks to impair or impede indirectly for example through changes in public opinion, directives issued by the President or agency director, or congressional action. One who seeks to influence the activities of covert agents only by influencing public debate in the United States is beyond the reach of this section unless he acts with reckless disregard for the safety of the agents whose identities he seeks to expose.

The government would be required to present independent evidence of the necessary intent independent of proof of the pattern of activities and of the disclosure. The evidence would have to show specifically that the individual intended to impair by the fact of disclosure.

Section 501(c) is fully consistent with the following comments of the chief sponsor of the bill, Senator Chafee, when testifying before the Judiciary Committee:

This is an intolerable situation. As legislators, I believe that we have a responsibility to draft a bill which places criminal penalties on those who are in the business of exposing our agents, and, which, at the same time, does not threaten the critic of intelligence policy or the journalist who might reveal the name of an agent in the course of a news report."

* * * * *

"We have carefully differentiated between the journalist who may reveal the name of an agent in a news article and the person who has made it his purpose and business to reveal the names of agents, and has engaged in a pattern of activities intended to do so. Clearly, the legitimate journalist would not be engaged in such a pattern of activities." [4]

To meet the standard of the bill, a discloser must be engaged in a purposeful enterprise of revealing names—he must, in short, be in the business of "naming names."

The following are illustrations of activities which would not be covered even if identities are disclosed.

An effort by a newspaper to uncover CIA connections with it, including learning the names of its employees who worked for the CIA.

An effort by a university or a church to learn if any of its employees had worked for the CIA. (These are activities intended to enforce the internal rules of the organization and not identify and expose CIA agents.)

An investigation by a newspaper of possible CIA connections with the Watergate burglaries. (This would be an activity undertaken to learn about the agency's connections with the burglaries and not to identify and expose CIA agents.)

An investigation by a scholar or a reporter of the Phoenix program in Vietnam. (This would be an activity intended to investigate a controversial program, not to reveal names.)

The phrase "reckless disregard" is intended to have the meaning adopted in the revised Federal criminal code. See Judiciary Committee Report, P.——,

The individual whose identity is disclosed must be one whose identity was learned in the course of the necessary pattern of activities. On the other hand it would not be sufficient nor necessary to demonstrate that the disclosure itself was made with the intent to impair or impede or with reckless disregard. It is the pattern of activities which must be shown to have the stated purposes of uncovering and exposing and impairing or impeding or the purpose of uncovering and exposing with a reckless disregard for the safety of the agents.

Several illustrations will help to clarify the meaning of the phrase "by the fact of such uncovering and exposing". In each it is assumed that all of the other requirements of the statute have been met.

An individual is opposed to an on-going CIA operation in country Y. He knows that if he lists the names of the CIA agents in the country they will be forced to return home. He discloses their names in order to force them to return home and hence to impair the operation in which they are engaged. He is covered by the language even if he has another or larger purposes of persuading the Congress to end certain types of covert operation.

Another individual equally opposed to the same CIA operations in country Y exposes the names of CIA agents in order to force the intelligence committees of the Congress to enact legislation which would end such operations or to lead the President to order a halt to the operation. He is not covered by the statute even if he knows that the disclosure would require that some of the agents be sent home and the operation would be impaired if they were sent home. He lacks the necessary intent to impair by the fact of disclosure itself.

An individual learns of activities of covert agents which the reasonably believes to be in violation of applicable laws, executive orders and agency regulations. He reveals a name with the intent that the President of the head of the intelligence agency will order the activity to end or that the individual will be indicted for a violation of law or that a congressional committee pursues an investigation of the matter. He would be beyond the statute.

On the other hand an individual who exposed agents identities for the purpose of impairing the effectiveness by the act of exposing itself would be within the statute even if he believed that the individual whose identity he exposed was engaged in activities which are in violation of applicable laws or executive order or agency regulation.●

● Mr. BAYH. Mr. President, on August 13 of this year the Select Committee on Intelligence reported the bill, S. 2216, the Intelligence Identities Protection Act. This bill addresses a serious problem that confronts the U.S. intelligence community. In recent years a small number of Americans have made concerted efforts to destroy the effectiveness of lawfully authorized U.S. intelligence activities by systematically identifying and exposing the names of individuals who serve our country as intelligence agents sometimes at great risk and sacrifice. They have uncovered and exposed the identities of U.S. intelligence agents without regard for the physical dangers that such men and women confront in countries around the world. I am convinced that legislation must be passed to deter and punish such activities, and that such legislation can achieve its intended result without violating first amendment rights. I supported S. 2216 when it was reported by the Select Committee, and I continue to support its passage by the Senate.

At the request of the chairman of the Committee on the Judiciary under the provisions of Senate Resolution 400, the bill was sequentially referred to that committee. The Judiciary Committee reported S. 2216, with amendments, on September 24 and it is presently on the calendar for Senate action.

Several issues were raised in the Judiciary Committee that had not been specifically addressed in such formulation in the Select Committee. They reflected concerns of Members that, in my judgment, had to be taken into account if there were to be the broad support necessary for passage of the bill in this session. Therefore, along with other Members of the Judiciary Committee, I supported certain amendments for the purpose of carrying forward this urgent process of achieving a consensus to facilitate prompt enactment of the bill.

There was a clear understanding, set forth by the chairman of the Judiciary Committee before the amendments were

[3] Statement of Robert L. Keuch, Associate Deputy Attorney General, on S. 2216, before the Senate Committee on the Judiciary, September 5, 1980, p. 7.

[4] Statement of Senator John H. Chafee on S. 2216, before the Senate Committee on the Judiciary, September 5, 1980, pp. 2 and 7.

offered, that further efforts would be made to work out various differences between the versions of the bill reported by he select committee and the Judiciary Committee. During the past week intensive discussions have taken place between representatives of the two committees. Unfortunately, it has not yet been possible to reach an agreement that would satisfy all concerns. Nevertheless, I strongly urge my colleagues on both committees not to give up the effort to pass this legislation which is so important to the effectiveness and safety of our Nation's intelligence officers as they carry out their duties in the national interest.

As chairman of the Select Committee on Intelligence and as a member of the Judiciary Committee, I have no hesitation in supporting S. 2216 as reported by the select committee. Even if compromise language cannot be found, the select committee's report makes clear that the bill is not to be used to prosecute activities protected by the first amendment to the Constitution. S. 2216 should be quickly passed by the Senate and expeditiously enacted into law.●

RESUMPTION OF ROUTINE MORNING BUSINESS

Mr. ROBERT C. BYRD. Mr. President, I ask unanimous consent that there be a resumption of routine morning business, for not to exceed 15 minutes, and that Senators may speak therein.

The ACTING PRESIDENT pro tempore. Without objection, it is so ordered.

Mr. THURMOND. Mr. President, when the 96th Congress closes, our Nation's 30 million veterans and the Fourth District of Texas will lose a great friend and advocate in Washington with the retirement of Congressman RAY ROBERTS, chairman of the House Committee on Veterans' Affairs.

Mr. President, as the senior Republican member of the Senate Committee on Veterans' Affairs, I have had the pleasure of working closely with RAY ROBERTS on veterans legislation. I can attest to his hard work and strong stand on behalf of programs and benefits for the men and women who served this country in the armed services.

RAY ROBERTS has served as chairman of the House Veterans' Affairs Committee since January 1975 and has been a committee member since his election to Congress in 1962. During his tenure as chairman, the current administration initiated much legislation that would adversely affect veterans and veterans programs. Under his leadership and direction, many of these legislative initiatives were altered or defeated. I remember well how RAY ROBERTS and I worked together to modify an administration recommendation that provided for the upgrading of bad discharges for many veterans and which, in turn, would have granted automatic entitlement for veterns benefits to a select group of veterans at the expense of those who served honorably.

Next, RAY ROBERTS led the fight in defeating administration-sponsored legislation that would have transferred veterans compensation and pension programs to the Department of Health, Education, and Welfare and GI bill programs to the newly created Department of Education. Also, when the administration attempted to eliminate long-standing veterans preference laws, RAY ROBERTS guided this proposal to its ultimate defeat in the House.

Mr. President, these are only a few examples of the strong and effective stands that RAY ROBERTS has taken on legislation that would have detrimentally affected veterans and veterans programs. Congress will miss the character, integrity and capacity of RAY ROBERTS of McKinney, Tex.

Mr. President, on this occasion I want to convey to him my sincere appreciation for his friendship and the limitless cooperation RAY ROBERTS has extended to me. I wish him well in his much earned retirement.

QUORUM CALL

Mr. THURMOND. Mr. President, I suggest the absence of a quorum.

The ACTING PRESIDENT pro tempore. The clerk will call the roll.

The bill clerk proceeded to call the roll.

Mr. HART. Mr. President, I ask unanimous consent that the order for the quorum call be rescinded.

The ACTING PRESIDENT pro tempore. Without objection, it is so ordered.

The Senator from Colorado is recognized.

Mr. BAKER. Mr. President, if the Senator from Colorado will withhold for one brief moment I think it might expedite the proceedings.

Mr. HART. Mr. President, I suggest the absence of a quorum.

The PRESIDING OFFICER (Mr. SARBANES). The clerk will call the roll.

The bill clerk proceeded to call the roll.

Mr. HEFLIN. Mr. President, I ask unanimous consent that the order for the quorum call be rescinded.

The PRESIDING OFFICER. Without objection, it is so ordered.

STATE AND LOCAL GOVERNMENT FISCAL NOTE ACT

Mr. HEFLIN. Mr. President, I rise to give my enthusiastic support to S. 3087, the State and Local Government Fiscal Note Act of 1980—perhaps the most fiscally sound piece of legislation to be considered by the full Senate this session.

I wish to compliment Senators SASSER and ROTH for their leadership in drafting this important legislation. When this bill is passed by both Houses and signed into law, every elected official in this Nation, and particularly those at the State and local level, will be forever grateful to the Senator from Tennessee and the Senator from Delaware for their fine work.

Mr. President, our Nation's small towns and cities are struggling under the weight of excessive Government regulation. If there be any doubt of this fiscal struggle at the State and local level brought on by the myriad Federal requirements and regulations, that doubt could be easily erased by talking to any one of the hundreds and thousands of local officials who have been crying out for this kind of legislation for years. Indeed, numerous representatives of State and local governments testified for this bill during the committee process.

The cost to State and local governments of complying with Federal mandates and requirements has risen so dramatically in recent years that if we do not take action—and soon—the Federal Government will literally bankrupt this Nation's cities and small communities.

The State and Local Government Fiscal Note Act of 1980 will require the Congressional Budget Office to prepare and submit to Congress the cost to State and local governments of all significant legislation—before Congress votes on the proposed legislation.

The CBO already prepares a fiscal note—or fiscal impact statement on a proposed bill's estimated cost to the Federal Government itself. By extending this fiscal note process to the effect on State and local governments, the Congress will know before it passes expensive legislation what the ultimate effect of the bill will be.

These fiscal notes would serve as a desperately needed yellow caution light to Congress before it goes ahead unthinkingly, or ignorantly, with legislation whose cost and negative effect far outweigh the intended good.

The Subcommittee on Intergovernmental Relations estimates that the cost of implementing this legislation will be at least $800,000 for the first year alone. However, this amount is literally dwarfed by the countless billions of dollars spent by local governments in carrying out current Federal requirements.

Mr. President, a full 15 percent of the 1980 Federal budget went to pay for grant programs administered by State and local governments. While saying it is "helping" State and local governments, Washington has placed so many costly, confusing and often contradictory Federal requirements on local governments that local officials spend much of their time and money doing nothing but complying with the maze of Government paperwork.

Mr. President, the passage of the State and Local Government Fiscal Note Act of 1980 would send a strong and clear signal to State and local governments that Congress is finally beginning in earnest to grapple with the serious economic problems that plague our Nation. If we are to restore fiscal sanity in the signal to tSate and local governments must act responsibly and stop wasting the American taxpayers' hard-earned tax dollars.

Mr. President, in closing, I was very pleased to learn that the Senate Budget Committee approved S. 3087 by a unanimous 16 to 0 vote. I urge all of my colleagues to support this very important bill.

Mr. President, I suggest the absence of a quorum.

The PRESIDING OFFICER. The clerk will call the roll.

The bill clerk proceeded to call the roll.

Mr. HART. Mr. President, I ask unan-